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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

JONATHAN BRUCE REED,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Should this Court review a Texas criminal defendant's pre-trial complaint that no available state procedure affords him an opportunity to assert that his trial would violate the double jeopardy clause of the Fifth Amendment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INDEX OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
MOTION TO DISMISS OR AFFIRM	2
CONCLUSION	6

INDEX OF AUTHORITIES

Cases	Page
Abney v. United States, 431 U.S. 651 (1977).	3
Baker v. Metcalfe, 633 F.2d 1198 (5th Cir. 1981).	5
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).	3
Elkins v. United States, 364 U.S. 212 (1960). . . .	3
Ex parte Huffhines, Nos. 60,749; 60,750; 60,751 (Tex.Crim.App., Oct. 10, 1979).	5
Garcia v. Dial, 596 S.W.2d 524 (Tex.Crim.App. 1980)	4
Mapp v. Ohio, 367 U.S. 643 (1961)	3,4
United States ex rel. Stewart v. Hewitt, 517 F.2d 993 (3d Cir. 1975)	5
United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3d Cir. 1975).	5
Vance v. Routt, 571 S.W.2d 903 (Tex.Crim.App. 1978)	4
Weeks v. United States, 232 U.S. 383 (1914)	3
Wolf v. Colorado, 338 U.S. 25 (1949).	4

Constitutional Provisions and Statutes	
Article 5, §5, Texas Constitution	2
Tex. Code Crim. Pro. Ann. art. 11.07	2
Rule 15(a), Rules of the Supreme Court of the United States	2

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Appellee herein, by and through its attorney, the Attorney General of Texas, and respectfully moves to dismiss the appeal or affirm the order of the Texas Court of Criminal Appeals denying Appellant the relief sought.

OPINIONS BELOW

The order of the Court of Criminal Appeals denying Appellant leave to file his original application for writ of habeas corpus and the order of the Criminal District Court No. 5 of Dallas County, Texas, refusing to issue the writ of habeas corpus and writ of prohibition are attached to the Jurisdictional Statement as Appendices 1a and 2a, respectively.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(2).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein, in addition to the statutory and constitutional provisions cited by Appellant, is Article 5, §5 of the Texas Constitution, which provides as follows:

> Subject to such regulations as may be prescribed by law, regarding criminal matters the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writs of habeas corpus, mandamus, procedendo, prohibition, certiorari, and other such writs as may be necessary to protect its own jurisdiction or enforce its judgments.

Also involved is Article 11.07, §1 of the Texas Code of Criminal Procedure, which provides as follows:

> After indictment found in any felony case, and before conviction, the writ must be made returnable in the county where the offense has been committed.

STATEMENT OF THE CASE

Appellee is in substantial agreement with Appellant's statement of the case.

MOTION TO DISMISS OR AFFIRM

Rule 15(a) of the rules of this Court provides that "[o]nly the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court." Appellant's statement of the questions presented clearly shows that he seeks to attack only those provisions of the Texas Code of Criminal Procedure which govern the manner in which claims of former jeopardy may be presented and reviewed. Appellant does not ask this Court to rule on the merits of his double jeopardy claim. That he does not is hardly surprising in light of the lack of any record before this Court from which the sufficiency of the evidence at Appellant's former trial might be determined. Instead, Appellant assails the Texas statutory provisions for review of claims of former jeopardy on the ground that they do not comport with the procedure mandated in federal courts by

Abney v. United States, 431 U.S. 651 (1977). Obviously, the Court is not prepared to decide the merits of every double jeopardy claim brought from a state jurisdiction whose criminal procedure does not contemplate the type of pretrial review delineated by Abney. Just as obviously, the relief available to Appellant herein is limited to a determination whether the Abney rule is constitutionally mandated. Because Appellant has not requested a ruling on the merits of his claim and because there is no record before this Court upon which such a decision might be based, the only allowable remedy would be a declaration that the Texas statutory procedures involved are constitutionally infirm.

In Abney, this Court exercised its supervisory powers over federal criminal prosecutions and held that a pretrial order denying a motion to dismiss on double jeopardy grounds is an appealable "final decision" under 28 U.S.C. §1291 and Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). 431 U.S. at 662. Appellant, in seeking to elevate this procedural mechanism to constitutional status, would have this Court sit as a "super legislature" and formulate rules of procedure for state prosecutions. Such an undertaking not only offends traditional notions of comity and federalism but is also fraught with serious practical problems, as discussed below.

Because "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflicts between state and federal courts," Elkins v. United States, 364 U.S. 212, 221 (1960), this Court has always proceeded cautiously in requiring the states to adopt specific procedures for ensuring basic constitutional rights. For example, the exclusionary rule announced in Weeks v. United States, 232 U.S. 383 (1914) was not made applicable to the states until almost half a century later in Mapp v. Ohio, 367 U.S. 643 (1961). Significantly, this development did not occur for some forty-seven years despite "the plain and unequivocal language of Weeks . . . to the effect the

Weeks rule is of constitutional origin . . . " Mapp, 367 U.S. at 649. Despite this prudent and circumspect expansion of the rule, it remains subject to serious criticism. See, e.g., Stone v. Powell, 428 U.S. 465, 489-91 (1976). Appellant herein, by contrast, asks this Court to make binding upon the states a procedural device extant for only four years. Appellee submits that such a precipitous rush to judgment not only runs counter to settled principles of judicial restraint but also ignores the possibility of alternative remedies.

> [W]e have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

Wolf v. Colorado, 338 U.S. 25, 28 (1949).

Because there are other adequate remedies which Appellant has failed to utilize, this Court should decline to exercise its jurisdiction over this appeal. Following the trial court's denial of his application for writ of habeas corpus and writ of prohibition, the only action Appellant took was to apply for leave to file an application for writ of habeas corpus in the Texas Court of Criminal Appeals. Under Article 11.07, §1 of the Texas Code of Criminal Procedure, the Texas appellate court is without jurisdiction to issue a preconviction writ of habeas corpus; thus, understandably, Appellant's application was denied by that court. There is, however, another state procedure of which Appellant failed to avail himself. Under Article 5, §5 of the Texas Constitution, as amended effective January 1, 1978, the Court of Criminal Appeals may issue any extraordinary writs necessary to protect its own jurisdiction or enforce its judgments. See, Garcia v. Dial, 596 S.W.2d 524 (Tex.Crim.App. 1980); Vance v. Routt, 571 S.W.2d 903 (Tex.Crim.App. 1978). An

application for writ of mandamus or prohibition might well be the appropriate means by which Appellant might receive a ruling from the Texas Court of Criminal Appeals upon the merits of his double jeopardy claims. Certainly this procedural device would avoid the insurmountable procedural hurdles to the Court of Criminal Appeals' consideration of his original application for writ of habeas corpus. These hurdles are discussed in Ex parte Huffhines, Nos. 60,749, 60,750, & 60,751 (Tex.Crim.App., Oct. 10, 1979), attached to the jurisdictional statement as Appendix 6.

When Appellant sought relief in the convicting court, he styled his pleading, "Application for Writ of Habeas Corpus and Application for Writ of Prohibition." (Appendix 2b to the jurisdictional statement). Inexplicably, when he sought to raise his claims in the Court of Criminal Appeals, he deleted any reference to a possible writ of prohibition and entitled his motion only as an "Original Application for Writ of Habeas Corpus." (Appendix 1c to the jurisdictional statement.) The application contains no argument in support of a writ of prohibition.

Thus, there is a substantial possibility that Appellant possesses the procedural means to accomplish precisely that which he claims is impossible: pretrial review of the merits of his double jeopardy claims in the Texas courts. This Court should decline to hear an appeal where there is an available state procedure by which the federal question might be raised. To do otherwise would seriously offend vital comity interests that the Court should seek to preserve and protect.

Should Appellant be unable to secure an extraordinary writ from the Texas appellate court, he still is not without a remedy. At least two United States Courts of Appeals have held that federal habeas corpus is a proper means for insuring compliance with Abney. See, Baker v. Metcalfe, 633 F.2d 1198, 1200 n.3 (5th Cir. 1981); United States ex rel. Stewart v. Hewitt, 517 F.2d 993 (3rd Cir. 1975); United States ex rel. Webb v. Court of Common

Pleas, 516 F.2d 1034 (3rd Cir. 1975). Because Appellant has failed to take advantage of these alternative remedies at both the state and federal levels, his appeal should not be heard by this Court.

CONCLUSION

For the reasons stated, this appeal should be either dismissed or affirmed.

Respectfully submitted,

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